United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7637

To Be Argued By
Lewis F. Tesser

CHARLES D. REICH,

Appellant,

-v-

DOW BADISCHE COMPANY AND
DOW CHEMICAL COMPANY,

Appellees.

APPEAL

BRIEF FOR THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from an Order dated December 13, 1976 granting summary judgment to the defendants-appellees. The action was initiated by the filing of a Complaint on June 29, 1976. The Complaint alleged that the appellant had been discriminated against by the appellees because of his age in violation of the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. After limited discovery, the defendant moved to dismiss the Complaint pursuant to the Federal Rules of Civil Procedure for lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim upon which relief can be granted (Rule 12(b)(6)) or, in the alternative, for summary judgment (Rule 56). After opposing affidavits and memoranda were filed, and after oral argument without a hearing or the taking of any testimony, United States District Judge Inzer B. Wyatt, on November 22, 1976, endorsed a memorandum on the Notice of Motion dated October 13, 1976 as follows:

> The requirements of 29 U.S.C. §626(d) are jurisdictional and notice of intent to sue was not given in the required time. Powell v. S.W. Bell Telephone Company, 494 F. 2d 485, Hiscott v. General Electric Company, 521 F. 2d 632. The motion has been treated as one for summary judgment and is granted. Settle order on notice. November 19, 1976.

On December 13, 1976, the District Court, having found that there was no genuine issue as to any material fact, Ordered that judgment be entered dismissing the Complaint; judgment was entered on December 14, 1976.

STATEMENT OF THE CASE

On October 26, 1976, CHARLES D. REICH filed his Affidavit in Opposition to the defendants' motion to dismiss the action. In the affidavit, Mr. Reich made, inter alia, the following factual allegations:

(1) that he had been fired from the employ of the defendants on June 29, 1973 (JA 40); [1]

(2) that in December, 1973 (presumably before December 29, 1973), he had twice given notice to responsible officials of the Department of Labor that he intended to sue in his own behalf (JA 27); and

(3) that this notice had occurred during the time that he had complained to the U.S. Department of Labor and that they had already begun the investigation of his case (JA 27) and that this notice had occurred during the time that he was continously engaged in attempts to

[1] "JA" followed by a number or numbers refers to the page or pages of the Joint Appendix.

secure counsel to represent him in his own behalf (JA 26). Notwithstanding Mr. Reich's clear assertions that he gave the Department of Labor notice of intent to sue within 180 days of his termination of employment if 29 U.S.C. §626(d)(1) was applicable (and, therefore, within 300 days of his termination of employment if 29 U.S.C. §626(d)(2) was applicable), the District Court found that "notice of intent to sue was not given in the required time" (JA 60). The Court did not state which time period it considered to be the required time. In this appeal, the appellant contends that he established a material factual issue, i.e., that he provided notice of intent to sue within the required time (whether 180 or 300 days) and that the District Court should have provided him the opportunity to prove his assertion.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the District Court err in holding, by summary judgment, that notice to the Secretary of Labor of an intent to sue pursuant to 29 U.S.C. §626(d) was not given in the required time when the appellant clearly asserted, in his affidavit in opposition to summary judgment, that he provided the requisite notice?

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING, BY SUMMARY JUDGMENT, THAT NOTICE OF INTENT TO SUE WAS NOT GIVEN IN THE REQUIRED TIME

SUMMARY

There are material factual issues in dispute that must

yet be decided in order to determine whether or not the appellant gave timely notice to the Secretary of Labor (the "Secretary") of his intent to sue in his own behalf. The appellant unequivocally stated that he gave the requisite notice.

In his Affidavit in Opposition to Defendant's Motion, Charles D. Reich stated that in December, 1973, he twice informed officials of the U.S. Department of Labor that he would sue in his own behalf.

Title 29 U.S.C. §626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary of Labor not less than sixty days' notice of an intent to file such action. Such notice shall be filed -
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
> (2) in a case to which section 14(b) [§633(b) of this title] applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

The appellant was fired from the employ of the appellees on June 29, 1973 (JA 40).180 days from June 29, 1973 is December 26, 1973; 300 days from June 29,1973 is April 25, 1974. Thus, despite the appellant's protestations that he had given notice in the requisite time, the District Court, by means of summary judgment, held that he had not. (Point A).

Another explanation of the Court's decision could be that the timeliness of the appellant's notice is irrelevant because the notice itself was defective. But neither Powell v. Southwestern Bell Telephone Company., 494 F. 2d 485

(5th Cir. 1974), reh. den. 498 F. 2d 1402 (5th Cir. 1974), nor Hiscott v. General Electric Company, 521 F. 2d 632 (6th Cir. 1975), the only two cases cited by the District Court, support such an explanation, and, in fact, the Court made no such determination. Nevertheless, the appellant's notice of intent to sue was specific; he simply stated that he was going to sue, (Point B), and neither the statute nor any reported case dictates that the notice must have been in writing. Thus, appellant's oral notice that he intended to sue was not defective as a matter of law. (Point C).

The appellant strongly urges that he should have been given his day in court, even if it was only to respond to the jurisdictional claims of the appellees.

A. THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLANT'S NOTICE WAS UNTIMELY

The District Court cited only two cases in support of it's ruling -- Powell v. S.W. Bell Telephone Company, 494 F. 2d 485 (5th Cir. 1974), reh. den. 498 F. 2d 1402 (5th Cir. 1974) and Hiscott v. General Electric Company, 521 F. 2d 632 (6th Cir. 1975). The holding of both cases is exactly as the District Court stated, i.e., that the requirements of 29 U.S.C. §626(d) are jurisdictional and that notice of intent to sue, therefore, must be given in the prescribed time. In both Powell and Hiscott, it was conceded that notice, if given at all, was given after the statutory deadline.

In Powell, after being informed by the Department of Labor approximately four months after the alleged discrimination

occurred that the Department could not substantiate her claim of discrimination and would take no further action, the plaintiff waited for more than a year before notifying the Department of her intent to sue in her own behalf.

Similarly, in Hiscott, it was conceded that no notice of an intent to sue was ever given before the suit was instituted [2]. The necessity of timely notice was the issue in both cases.

Thus, it is clear that the court below ruled as it did because it believed that the appellant did not give timely notice.

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[2] Because it is appellant's argument that he gave timely notice, the appellant urges that it is unnecessary for this court to decide whether or not §626(d) is "jurisdictional". However, it should be noted that even the courts that have held the section to be jurisdictional have treated the section as a statute of limitations, i.e., subject to equitable tolling, estoppel, etc. See eg., Dartt v. Shell Oil Co., 539 F. 2d 1256 (10th Cir. 1976); Skoglund v. Singer Company, 403 F.Supp. 797 (D.N.H. 1975); Hiscott v. General Electric Company, 521 F. 2d 632 (6th Cir. 1975); Edwards v. Kaiser Aluminum & Chemical Sales, Inc. 515 F. 2d 1195 (5th Cir. 1975); McCrickard v. Acme Visible Records, Inc., 409 F. Supp. 341 (W.D. Va. 1976).

Thus, the facts and circumstances surrounding the giving of notice bear on the question of how, when, and even if the notice was given. The appellant merely requests the opportunity to present these facts and circumstances to the court. Appellant is unable to find one case where such an opportunity was denied. When cases have been summarily dismissed, either the facts of timely filing were not in dispute, eg., Powell v. S.W. Bell Telephone Company, 494 F. 2d 485 (5th Cir. 1974), reh. den. 498 F. 2d 1402 (5th Cir. 1974), or the court heard testimony regarding the facts and circumstances of the filing. Dartt v. Shell Oil Co. 539 F. 2d 1256 (10th Cir. 1976); Woodburn v. LTV Aerospace Corp., 531 F. 2d 750, 751 (5th Cir. 1976); Mizuguchi v. Molokai Elec. Co., 411 F. Supp. 590, 594 (D. Haw. 1976); Skoglund v. Singer Company, 403 F. Supp. 797, 805 (D.N.H. 1975).

In his affidavit in opposition to the motion for summary judgment, the appellant clearly stated that he gave timely[3] notice to responsible officials of the Department of Labor of his intent to sue. He simply told them that he was going to sue. Therefore, the finding of the court below was a determination of a contested issue of fact that should not have been decided summarily. F.R. Civ. P., Rule 56; Jaroslawicz v. Seedman, 528 F. 2d 727 (2d Cir. 1975); Heyman v. Commerce & Industry Insurance Company, 534 F. 2d 1317 (2d Cir. 1975); Judge v. City of Buffalo, 524 F. 2d 1321 (2d Cir. 1975); American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theaters, Inc., 388 F. 2d 272, 279 (2d Cir. 1967); Cali v. Eastern Airlines, Inc., 442 F. 2d 65, 71 (2d Cir. 1971).

B. THE APPELLANT'S NOTICE WAS SPECIFIC ENOUGH TO CONSTITUTE A NOTICE OF INTENT TO SUE

Some cases have held that merely requesting the Department of Labor to sue does not constitute the giving of notice of an intent to sue. See eg., Powell and Hiscott, supra, and Hays v. Republic Steel Corp., 531 F. 2d 1307, 1312 (5th Cir. 1976).

In the instant case, however, the appellant simply stated that he was going to sue when he obtained a lawyer. His notice was clear and unequivocal. In fact, the appellant's notice was more specific than has been required by any court that has considered the question.

For example, in Burgett v. Cudahy Company, 361 F. Supp. 617 (D. Kan.1973), the intent to file suit was expressly conditioned

[3] Although the appellant, in his affidavit did not state whether or not the notice he gave in December was before December 26th, he did so in oral argument before the District Court and the appellees have made no assertion to the contrary. Even if they had, it would constitute a material question of fact. In any event, the question should be resolved in the light most favorable to the appellant.

on the Department of Labor's election not to proceed. Nevertheless, the notice was considered sufficient. In the instant case, the notice was unconditional. See also, Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 915 (N.D. Ga. 1973).

C. ORAL NOTICE OF INTENT TO SUE IS NOT INSUFFICIENT AS A MATTER OF LAW

Neither case cited by the District Court involved the issue of whether oral notice was insufficient to satisfy the provisions of the ADEA; nevertheless, since the appellant concedes that he provided only oral notice, it is incumbent upon him to show that oral notice is not insufficient as a matter of law.

The only case on point, Woodford v. Kinney Shoe Corporation, 369 F.Supp. 911, 14-15 (N.D. Ga. 1973) held that a telephone call complaint to the Department of Labor constituted adequate notice. The appellant in the instant case provided two notices of intent to sue - in person.

In Woodford, the court stated it's reasons why it held that the notice, when given, did not have to be in writing. Inter alia, these reasons were: first, the statute itself does not require notice in writing; second, there is no legislative history that indicates that Congress intended that notice in writing be a prerequisite to suit, 1967 U.S. Code Cong. & Ad News, p. 2213; third, the position of the Department of Labor is ambiguous [4]; fourth, the section should not be rigidly construed because of the remedial and humanitarian nature of the Age

[4] See also, 29 U.S.C. §628, wherein the Secretary is authorized to issue implementing rules and regulations and to "establish such reasonable exceptions to and from any or all provisions". The Secretary's rules and regulations, 29 C.F.R §§860.1 860.120 have been silent on this issue.

Discrimination Act [5]; and the fifth fact that the corresponding section of the Civil Rights Act, 42 U.S.C. §2000, et seq., specifically demands a written charge, 42 U.S.C. §2000e-5(a)[6].

In addition to the reasons discussed in Woodford, the appellant urges that the court consider two additional factors: first, the difficulty of the courts in interpreting the "murky jurisdictional waters of .....§626(d)"[7], only emphasizes the difficulties of the interpretation responsibilities of someone who has been victimized by discrimination, perhaps for the first time in his life, see, eg., Dartt v. Shell Oil Co., 539 F. 2d 1256, 1260 (10th Cir. 1976); Mizuguchi v. Molokai Elec. Co., 411 F. Supp. 590 (D. Haw. 1976); second, at the early stage in old age discrimination proceedings in which one is required to give notice, he will often be acting alone, ie., unaccompanied by legal advice. Such were the case circumstances in the instant litigation. See Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 463, 465 (5th Cir. 1970); Skoglund v. Singer Company, 403 F. Supp. 797, 804 (D.N.H. 1975); Woodford v. Kinney Shoe Corporation, 369 F. Supp. 911, 915 (N.D. Ga. 1973).

[5] See Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 460-61 (5th Cir. 1970). See also, Dartt v. Shell Oil Co., 539 F. 2d 1256, 1260 (10th Cir. 1976); Moses v. Falstaff Brewing Corporation, 525 F. 2d 92, 93 (8th Cir. 1975); Anisgard v. Exxon Corp., 409 F. Supp. 212, 215 (E.D. La. 1975); and Skoglund v. Singer Company, 403 F. Supp. 797, 784 (D. N.H. 1975).
[6] See Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (5th Cir. 1970).
[7] Mizuguchi v. Molokai Elec. Co. 411 F. Supp. 590, (D. Haw. 1976).

D. EVEN IF THE APPELLANT'S NOTICE WAS DEFECTIVE, HE SHOULD HAVE HAD THE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES AND OBTAIN EQUITABLE RELIEF

Despite the fact that §626(d) has been termed "jurisdictional", the case law is clear that the court may inquire into the circumstances of a defective filing in order to determine whether or not equitable considerations may operate to cure the defect. Dartt v. Shell Oil Co., 539 F. 2d 1256 (10th Cir. 1976); Ott v. Midland-Ross Corporation, 523 F. 2d 1367 (6th Cir. 1975); Skoglund v. Singer Company, 403 F. Supp. 797, 804 (D.N.H. 1975) Cf. Eklund v. Lubrizol Corp.,529 F. 2d 247, 250 (6th Cir. 1976); McCrickard v. Acme Visable Records, Inc., 409 F. Supp. 341, 344 (W.D. Va. 1976); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F. 2d 1195 (5th Cir. 1975).

In the instant litigation, instead of being helped by the advice available at the Department of Labor, the appellant was misled and hindered by the actions of the Department. Orally, and to a certain extent, in writing, the appellant was led to believe that he had complied with the notice requirements. Thus, even if this Court should hold that the appellant's notice was defective, he should have been allowed the opportunity to explain his encounters with the Department of Labor[8].

[8] It should be noted that the prime reasons for the notice requirement, i.e., to provide an employer notice of the impending litigation and to provide the Department an opportunity to settle the dispute, were satisfied in the instant litigation. The Department was actively engaged in an attempt to settle this dispute with the employer well within 180 days from the discriminatory act. The goals of the act were complied with and the appellees suffered absolutely no prejudice. See Dartt v. Shell Oil Co., 539 F. 2d 1256, 1261 (10th Cir. 1976); Anisgard v. Exxon Corp., 409 F. Supp. 212, 214 (E.D. La. 1975); Burgett v. Cudahy Company, 361 F. Supp. 617 (D. Kan. 1973).

CONCLUSION

The case should be remanded to the District Court for a factual determination of whether or not the appellant gave the Department of Labor notice of his intent to sue.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES D. REICH,

Plaintiff,

-against-

DOW BADISCHE COMPANY and
DOW CHEMICAL COMPANY,

Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROGER D. OLSON, being duly sworn deposes and says:

I am not a party to this action; I am over the age of 18 years; I reside at 169 West 78th Street, New York, New York 10024; that on February 14, 1977, I served the within Brief and Joint Appendix upon Kaye, Scholer, Fierman, Hays and Handler, attorneys for appellees, at 425 Park Avenue, New York, New York 10022; by personally serving an individual authorized to accept service of the aforesaid papers.

Roger D. Olson
Roger D. Olson

Sworn to before me
this 14th day of February, 1977

Kristine M. Lardner

KRISTINE M. LARDNER
Notary Public, State of New York
No. 31-4635504
Qualified in New York County
Commission Expires March 30, 1978

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COPY RECEIVED

Date 2/14/77

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Attorney(s) for Appellees